ELECTION OF REMEDIES: EFFECT OF PREVIOUS ACTION ON INCONSISTENT REMEDIAL RIGHT.—In the case of *McGibbon v. Schmidt*[1] the plaintiff sought specific performance of a contract for the sale of land. The defendant pleaded as a defense that the plaintiff had on a previous occasion sued him on a common count to recover the portion of the purchase price already paid in accordance with the contract. It appeared that the plaintiff was nonsuited in his first action, but the reason therefor was not disclosed. The defense was held to be bad, and judgment went for the plaintiff on the assumption that the nonsuit in the previous action was "based upon the fact that no rescission, termination or breach of the contract had been proven, and that it was still in force; that the plaintiff had no remedy such as she sought to enforce by that action."

The question involved is the so-called doctrine of election of remedies. The Supreme Court of North Carolina stated the doctrine in the following words: "An election once made with knowledge of the facts between coexisting remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon any remedial right inconsistent with that asserted by the election."[2] The principle of the rule, so far as it can be gathered from the decisions, is that public policy demands that a suitor shall not experiment with the remedies which the law affords, that to permit a suitor to commence an action on one theory and later to dismiss that action and commence a new one on a different theory, imposes a useless and unnecessary burden on the courts.[3] This clearly indicates the prevailing tendency to treat the doctrine as a rule of pleading, and few decisions are on record wherein the question was decided on principles of substantive law. The courts have used the words "estoppel," "waiver" and "ratification," but seldom to denote the principles of law which those words actually represent. In other branches of the law it is freely admitted that a person may lose a right by waiving it, or by estoppel, or by the ratification of an inconsistent act done under the same general right. In view of these principles of substantive law, there seems to be no place for the so-called doctrine of election of remedies standing by itself and operating of its own force.

Whenever a plaintiff has so far prosecuted an action based on one remedial right that he has gained an advantage over his adversary, and the latter has thereby suffered a detriment, he should be estopped to commence a subsequent action on a different remedial

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[1] (Feb. 6, 1916), 51 Cal. Dec. 195.

[2] Stewart v. Salisbury Realty & Ins. Co. (1912), 159 N. C. 230, 74 S. E. 736.

[3] Liver v. Mills (1909), 155 Cal. 459, 101 Pac. 299; Peters v. Bain (1890), 133 U. S. 670, 10 Sup. Ct. Rep. 354, 33 L. Ed. 696.

right.[4] The mere fact of having commenced the first action, however, is not necessarily such estoppel as will constitute a bar.[5] The elements of an estoppel in pais must be present. So when the defendant has fraudulently obtained goods under a contract of sale, the plaintiff may waive the tort and sue on the contract, but if he does so and obtains a judgment, he has effectually waived all rights to an action for damages, or to recover the goods.[6] If a third party assumes to act for the plaintiff, though at the time his action is not known to the latter, and the plaintiff afterwards by proper proceedings in court claims the benefits of the third party's act, the plaintiff thereby ratifies the agency and precludes himself from subsequently prosecuting any other remedial right.[7]

When a plaintiff has already pursued one remedial right to judgment, there can be no question that this may be pleaded as a bar to a subsequent action on the same facts though upon a different remedial right.[8] The courts have also quite uniformally held that where the plaintiff was mistaken and undertook to avail himself of a remedy to which he never was entitled this would not bar a subsequent action to which he was entitled under the actual facts.[9] Such a view is demanded by the first principles of justice, and it is not inconsistent with the doctrines of estoppel, waiver and ratification.

The doctrine of election of remedies, as now applied by the courts, always operates in favor of the defaulting party and against him who was originally entitled to redress. It is cumbersome in operation, frequently throwing upon the court the burden of trying in one action the question whether the plaintiff would have succeeded in another. A critic says of the doctrine, "The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of obiter dictum but not reaching the sub-soil of principle. The judicial gardeners, through whose carelessness it has crept in should be able to eliminate it, or at least to prevent its further growth."[10]

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[4] Butler v. Hildreth (1842), 5 Met. 49.

[5] Fisher v. Brown (1903), 111 Ill. App. 486.

[6] Terry v. Munger (1890), 121 N. Y. 161, 24 N. E. 272; Holt Mfg. Co. v. Ewing (1895), 109 Cal. 353, 42 Pac. 435. The cases on this subject, however, are not in accord as to what constitutes a waiver of fraud. See note in 8 L. R. A. (N. S.) 582.

[7] Robb v. Vos (1894), 155 U. S. 13, 15 Sup. Ct. Rep. 4, 39 L. Ed 52; McClellan v. McClellan (1910), 135 Ga. 95, 68 S. E. 1025.

[8] The bar, however, should be no more extensive in such a case than if the plaintiff repeated the identical action.

[9] McGibbon v. Schmidt, supra, n. 1; Agar v. Winslow (1899), 123 Cal. 587, 56 Pac. 422; Hines v. Ward (1898), 121 Cal. 115, 53 Pac. 427; Equitable Co-op. Foundry Co. v. Hersee (1886), 103 N. Y. 25, 9 N. E. 487.

[10] Charles P. Hine in 26 Harvard Law Review, 707, 719.